No. 188.

In the

Supreme Court of the United States.

October Term, 1920.

ANCHOR OIL COMPANY, *Appellant,*

VERSUS

W. H. GRAY, *ET AL., Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEES.

A. A. DAVIDSON,
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Believing that a statement of the essential facts as they appear in the record, will be of service to the court, we submit the following:

Jennie Samuels was a full-blood Creek Indian, enrolled opposite Roll No. 5941, and as such, the eighty acres involved, described as the East Half (E½) of the Northwest Quarter (NW¼) of section thirty-six (36), township eighteen (18) north, range twelve (12) east, Tulsa County, Oklahoma, were allotted to her, and patent therefor approved October 9, 1903 (Rec., pp. 3-4). The fact that part of the tract involved is homestead and a part surplus is without significance in this case.

Jennie Samuels died October 11, 1915, and left as her heirs, a daughter, Feney Rogers, and a granddaughter, Lina Lowe, to whom the land descended. Both Feney and Lina were full-blood Creek Indians, duly enrolled as such.

The rights of appellees, who are in possession of the premises and operating same for oil and gas, arose as follows:

Prior to her death, and on December 5, 1914, Jennie Samuels, pursuant to the rules and regulations of the Secretary of the Interior, made an oil and gas mining lease covering the lands in controversy. This lease was duly filed in the office of the United States Indian Agent (now designated as Superintendent of the Five Civilized Tribes), Union Agency, at Muskogee, *on the 5th day of January, 1915.* It was sent forward to the office of the Commissioner of Indian Affairs with favorable recommendation, and in due course by the Indian Commissioner to the Secretary's office, *and was approved by the Secretary October 21, 1915.* This final approval by the Secretary, it will be noted, was ten days after the death of Jennie Samuels (Rec., p. 58).

This departmental lease was not filed for record in the local recorder's office, upon its approval by the Secretary—it was not in fact filed for record in the County until August 10, 1916 (Rec., p. 59), which was subsequent to the execution and recording on the county records of the leases under which appellant claims, as will presently appear.

Appellees, who, by virtue of mesne assignments, have become the owners of this lease, began active operations on the premises in the spring of 1916, prior to the institution of this suit, and have ever since been engaged in the production of oil therefrom.

The asserted claim of appellant is as follows:

After the death of the original allottee, Jennie Samuels, *and some six weeks after the Secretary of the Interior had approved the departmental oil and gas lease now owned by appellees,* that is to say, *on December 6, 1915,* one of her heirs, Feney Rogers, executed a lease on the entire eighty acres here involved. Feney, and the other heir, Lina Lowe, having agreed upon a division of the tract by which Feney took the north sixty acres thereof, the County Court approved her lease on the day it was executed so far, and so far only, as this north sixty acres of the tract was concerned (Rec., p. 4).

Three weeks later, that is, *December 27, 1915,* Lina Lowe, made an oil and gas lease on the south twenty acres of the tract, which was approved by the County Court January 3, 1915.

These two leases have by mesne assignments become the property of appellant, Anchor Oil Company, and both of said leases and the several assignments thereof were recorded in the county records (office of the county clerk) prior to August 10, 1916, which was the date appellees filed the departmental lease in the local (county clerk's) recording office.

This suit was begun January 18, 1917, some eight months or more after appellees had developed the premises for oil and were engaged in producing the same therefrom. The bill prays a cancellation of the lease of appellees; that they be enjoined from interfering with appellant in the possession of the premises; and for damages for detention of the property. By an amendment, a further allegation was made that complainant, at the time it acquired the assignments of the leases under which it claims, had no information, knowledge or notice of the departmental lease under which appellees claim and the departmental lease was set up as an exhibit and made a part of the bill (Rec., pp. 51-59). By stipulation the motion to dismiss was made to relate to the bill and the amendment as though the two together constituted the original bill (Rec., p. 51).

There was a memorandum decision by the District Court (Rec., pp. 59-60) and pursuant thereto, an order sustaining the motion to dismiss and dismissing the bill (Rec., pp. 60-61). This was affirmed by the Circuit Court of Appeals, 257 Fed. 277.

Assuming the validity of its own leases, complainant's contention has been, and is, that the departmental lease is without validity because the Secretary had no legal right to approve it after the death of the allottee lessor, and at all events, is ineffectual against appellant for want of record. This was their only possible position (and it is said that necessity is the mother of invention), for, upon the facts, it is

at once apparent that appellant, as against appellees, is wholly without right in the premises, and there was no error in the judgment of the trial court, *unless:*

(a) Appellant is, not only itself the owner of a valid oil lease or leases upon the lands involved; but

(b) The lease of appellees is void or against it, either because an invalid instrument, or, as to the complaining company, has become so, by reason of failure of appellees to put it of record in the local recording office.

We shall present the matter to this court in four propositions set out below. In order to justify a reversal all of these propositions must be resolved against appellees. If, however, the court agrees with us as to the soundness of proposition number one and either of two or three, it will not be necessary to consider the fourth at all. In the event this court shall determine we are wrong as to proposition number one (a contingency which the writer of this brief cannot contemplate as at all possible), then the court must pass upon proposition four. For it goes without saying that if the complainant has not a valid lease there is no reason for the court to disturb parties in possession whether or not they are in of right.

First Proposition.

The lease made by Jennie Samuels, the original allottee, during her lifetime, and pending for approval in the Department of the Interior at the time of her death, was rightfully approved by the Secre-

tary, though the act of approving same did not occur until ten days after her death; and is a valid instrument.

Second Proposition.

The Act of Congress approved March 1, 1907, (34 Stat. 1026), which provides, *inter alia,* that "the filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice," was not repealed nor abrogated either by the Act of Congress providing for the admission of the State of Oklahoma into the Union, or by the Constitution of the State of Oklahoma, or by both together, and was in full force and effect at all of the times during which the transactions concerning the lands involved in this case took place.

Third Proposition.

If the Act of March 1, 1907, should be held to have been repealed by the Enabling Act and the admission of the State of Oklahoma into the Union, nevertheless the oil and gas mining lessees of Jennie Samuels under the departmental lease approved by the Secretary of the Interior, are prior in time and prior in right to those claiming under the subsequent leases made by the allottees' heirs after the approval of the former lease.

Fourth Proposition.

The leases under which appellant is asserting its claim and which constitute its only alleged right

in the premises, have never been approved by the Secretary of the Interior, as required by section 2 of the Act of Congress approved May 27, 1908 (35 Stat. 312), and are for that reason not valid instruments and confer no right on appellant.

I.

The lease made by Jennie Samuels, the original allottee, during her lifetime, and pending for approval in the Department of the Interior, at the time of her death, was rightfully approved by the Secretary, though the act of approving same did not occur until ten days after her death; and is a valid instrument.

The soundness of the foregoing proposition seems so entirely settled by adjudged cases as to leave little to be said argumentatively. In fact, not only the trial court in the instant case, but every court, so far as we have been able to ascertain, where the question was involved, has determined it favorably to the position of appellees.

—*Lomax* v. *Pickering*, 173 U. S. 26;
Lykins v. *McGrath*, 184 U. S. 169;
Scioto Oil Co. v. *O'Hern*, (Okla.) 169 Pac. 483;
Almeda Oil Co. v. *Kelly*, 35 Okla. 525, 130 Pac. 931;
Harris v. *Bell*, ... U. S. .... (Dec'd Nov. 15, 1920).

In both *Lykins* v. *McGrath* and *Lomax* v. *Pickering, supra*, this court decided that where a deed was

given by an Indian which depended for its validity upon approval by either the President of the United States or the Secretary of the Interior, such approval could be effectually given by the designated official as well after the death of the Indian grantor as before. The fact that during the pendency of the lease for approval the land descended to the heirs and was thereby freed of the original restrictions seems to us wholly immaterial. The heirs here were full-bloods, so that as we maintain the provision requiring the Secretary's approval still obtained as to them. *But the lease of appellees was made in December, 1914, when the allottee was living.* It was made under the provision of section 2 of the Act of Congress of May 27, 1908 (35 Stat. 312). The Secretary of the Interior was then, and has at all times since been, not only the proper official, but the sole official, having power to approve such leases. That such changes in the situation while leases of this sort were pending in the Department for approval, not only by reason of death, but from the direct operation of law as well, or the acts of the Secretary himself in removing restrictions, must from time to time occur, could not possibly have escaped the attention of the legislators. Had they intended that such change should affect the Secretary's power and authority it would have been so expressed in the statute. Even in judicial proceedings, where technical methods of procedure obtain, if a cause had been submitted to a court, or verdict has been rendered, prior to death of a

party, judgment may be rendered as of a date anterior to the death of the litigant. And the same is true where an appeal is taken from a lower court to a higher. After submission in the appellate tribunal the death of a party will not prevent a reversal or affirmance. Certainly more latitude and liberality should be allowed the Secretary of the Interior in handling these Indian leases.

The heirs could not so deal with the property after the death of allottee, even before the Secretary's approval, as to affect the rights of the Departmental lessees.

In *Lykins v. McGrath, supra,* Mr. Justice BREWER said:

> "But the applicability of the doctrine of relation is denied on the ground that the interests of new parties, to-wit, the plaintiffs, have sprung into being intermediate the execution of the conveyance and the approval of the Secretary. But one of the purposes of the doctrine of relation is to cut off such interests, and to prevent a just and equitable title from being interrupted by claims which have no foundation in equity. The doctrine of relation may be only a legal fiction, but it is resorted to with the view of accomplishing justice."

In the present case, the alleged claim of appellants had its inception long after the final approval by the Secretary of appellee's lease. It has no equities whatever that it can urge to defeat our title. If it has any right superior to the title of appellees,

it must be a legal right pure and simple growing out of the recording laws.

In *Scioto Oil Co.* v. *O'Hern, supra,* the facts were as follows:

> "Albert Cooper, a full-blood citizen of the Creek Nation, executed an oil and gas lease on the premises August 16, 1912, to John M. Ingram, which was filed in the office of the United States Indian Agent, Union Agency, at Muskogee, for the purpose of securing the approval of the Secretary of the Interior, which approval was granted December 29, 1912. Before the approval of said lease Cooper died, and his two brothers, being his only heirs, conveyed said lands to one Fox, which conveyances were approved by the County Court, and Fox thereafter conveyed to O'Hern. The lease executed by Cooper to Ingram was assigned to the Scioto Oil Company, who entered into possession of said land for the purpose of extracting oil therefrom. The oil and gas lease was not filed and recorded with the register of deeds of Tulsa County in accordance with the state recording laws, and Fox and O'Hern took title without actual notice of the execution of said lease."

And the Supreme Court of Oklahoma said:

> "Neither was said lease invalid because not approved prior to the death of Albert Cooper. At the time the lease was executed the parties thereto were both qualified to enter into it. The consideration was valid, the subject-matter legal, and there was a mutuality of obligation depending merely upon the approval of the Secretary of the Interior. *Almeda Oil Co.* v. *Kelly,* 35 Okla. 525, 130 Pac. 931; *Brader* v. *James,* 154 Pac. 560.

"The contract is not assailed on any of the grounds which usually render contracts invalid, but solely upon the ground that prior to the approval thereof by the Secretary one of the parties had died, and that the Secretary's power or authority to approve the same had lapsed, because of the death of the allottee operating to remove the restrictions against the alienation thereof under section 9, Act Congress May 27, 1908, c. 199, 35 Stat. 315. This contention cannot be sustained.

"In *Almeda Oil Co.* v. *Kelly, supra,* a lease had been executed and submitted to the Secretary for his approval, and prior to the approval thereof the restrictions of the allottee had been removed, and he thereafter changed his mind and desired to withdraw from said lease, but same was afterward approved by the Secretary. It was contended that because restrictions against the alienation of said land had been removed the Secretary had no right to approve the lease over his protest and objection. This contention, however, was denied, and it was held in accordance with what we have already stated that the contract only needed the approval of the Secretary to be valid in every particular, and that the approval of the Secretary related back to its execution and rendered it valid from that time, and it was further held that, if the removal of restrictions upon the allottee's complete right to lease would have any effect whatever, it would be to render the contract of the parties complete to be annulled only on or for some of the grounds under which equity gives relief.

"In *Pickering* v. *Lomax,* 145 U. S. 310, 12 Sup. Ct. 860, 36 L. ed. 716, the Supreme Court of the United States held, where a deed had been

executed under the Treaty of Prairie Du Chien, which provided that the lands should never be leased or conveyed to any person whatever without the permission of the President of the United States, that the neglect to obtain the approval of the President for thirteen years after the execution of the deed only showed that for that length of time the title was imperfect, and that the approval of the President after the expiration of that time operated upon the deed precisely as if the authority to execute the same had been previously given, inasmuch as the rights of no third parties had intervened between the date of the deed and the approval thereof, and this was true though the grantee of said deed had died previous to the approval thereof; and the rights intended to be conveyed to the grantee inured to his heirs, not as a new title acquired by the warrantor subsequent to his deed inures to the benefit of the grantee, but as a deed imperfect when executed may be made perfect as of the date of its delivery.

"In *Lykins* v. *McGrath*, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. ed. 485, it was held that the consent of the Secretary of the Interior to a conveyance by an Indian patentee whose patent prohibited alienation by him or his heirs without such consent may be given after the death of the Indian grantor, and, when so given, is retroactive in its effect, and relates back to the date of the conveyance so as to cut off any claim of the heirs of such grantors to the land. In all of these cases it appears that no equities had been acquired superior to those of the grantee in the lease or deed involved. In the present case no such rights could be acquired because of the Act of March 1, 1907, which made the filing of such

lease in the office of the Union Agency constructive notice of the execution thereof, and the rights intended to be conveyed thereby. The purpose of requiring the lease to be approved by the Secretary was to see that the allottee should not be wronged in any lease he might desire to make, and that the lease be subject to no unreasonable qualifications. It was not to prevent the leasing of the premises but to guard against imposition therein, and when the Secretary approved the lease, it was a determination that the purposes for which the restriction was imposed had been fully satisfied, that the consideration was ample and that there were no unreasonable stipulations contained in the contract. When this was accomplished, justice requires that the lease should be upheld, and to that end the doctrine of relation attaches to the approval of the lease and makes it operative as of the date of the execution thereof. The situation is very much like that where a deed had been fully executed and placed in escrow to be finally delivered on performance of a condition, and the brothers and their grantees who took with the notice imparted, under the Act of March 1, 1907, by the filing of the lease in the office of the Indian Agent, Union Agency, Muskogee, acquired no equities superior to those of the lessee and his assignee. The brothers were heirs of the allottee, and took all of the title which he had at his death but when the Secretary approved the lease, their claims as heirs cannot be compared with those of the lessee, in equity. They are not in the attitude of *bona fide* purchasers, and the doctrine of relation intervenes, and makes the approval by the Secretary retroactive and effective as of the date of the lease, and, as the brothers and their grantee

have no equitable rights superior to those of the lessee, it follows that the lease must be upheld."

On page seven, *et seq.*, of appellant's brief, it is insisted that the lease could not be approved by the Secretary of the Interior after her death, because of its provisions *(a) that it should extend for the term of ten years from the date of approval by the Secretary; (b)* that before the lease should be in force and effect lessee should furnish bond with responsible surety satisfactory to the Secretary; and *(c)* in the event restrictions on alienation should be removed, supervision of the Secretary should cease.

Now, so far as the *term* is concerned, that merely marks the limit of time during which the lessee was to actually enjoy the rights and privileges conferred. It in no manner has anything to do with the question of the validity of the lease, or the date of its execution, or the inception of rights under it. Parties may fully execute a lease in the fall which is not to take effect in possession and enjoyment until spring.

—*Johnson* v. *Carson, Etc. Co.*, 157 Fed. 145; *McCroy* v. *Tony*, (Miss.) 2 L. R. A. 847; *Whitney* v. *Ohlert*, (Mich.) 50 Am. R. 265; *Brown* v. *Kayser*, (Iowa) 18 N. W. 527.

The provision for the giving of bond before lessee's rights would be so far complete that he would be permitted to extract the oil and strip the land of its mineral content, usually its most valuable part, was a purely administrative matter for the protection of the government's ward. Upon the making and

approval of the lease the holder thereof had the absolute right to make the bond, and upon compliance with this requirement, enjoy all the benefits flowing from his contract. In principle this is no different from the doctrine announced in the cases last above cited.

In like manner, the provision with regard to supervision by the Secretary was inserted in all departmental leases to provide for future contingencies that were bound to happen in some cases, and could very well happen in any case. Had the lease here been approved by the Secretary immediately upon its execution by Jennie Samuels, it would have remained under the administrative supervision of the Secretary until her death, or some future act of Congress, or the action of the Secretary himself (as in *Almeda Oil Co.* v. *Kelly)* removed restrictions from the land. It was this supervision which was automatically to be ended by the happening of the event. The provision was inserted merely for the purpose of rendering unnecessary any formal action by the Secretary. It had nothing whatever to do with the Secretary's power or authority to approve a lease. In fact, that authority conferred by law could not be voluntarily surrendered by him.

II.

The Act of Congress approved March 1, 1907 (34 Stat. 1026), which provides, *inter alia,* that "the filing heretofore or hereafter of any lease in the office

of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice," was not repealed nor abrogated either by the Act of Congress providing for the admission of the State of Oklahoma into the Union, or by the Constitution of the State of Oklahoma, or by both together, and was in full force and effect at all of the times during which the transactions concerning the lands involved in this case took place.

It seems to us that, considering the situation as it actually existed when Oklahoma was admitted to the Union, the Act of Congress approved March 1, 1907 (34 Stat. 1026),

> "The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice" (34 Stat. 1015),

was not repealed by either the Enabling Act or by the state constitution, or by both together.

Furthermore, even if this act of Congress was repealed upon the admission of the state into the union, nevertheless, the consequences to the parties litigant in this action would not be what appellant contends. Even in such event, the law would be with the lessees under the departmental oil and gas mining lease; their rights would still be paramount to any rights derived from the grant of the heirs of the lessor. Congress, having provided for the making of a lease for oil and gas, with the approval of the Secretary of the Interior, *and not otherwise*, transac-

tions between third parties, especially where the transactions occurred as here after the approval, could not have the effect to destroy and render vain and nugatory his action in the premises.

That the act in question has not been repealed appears to be settled by the decisions of both this court and the Circuit Court of Appeals for the Eighth Circuit.

—*Anicker* v. *Gunsburg*, 246 U. S. 110, 226 Fed. 176;
Scioto Oil Co. v. *O'Hern*, (Okla.) 169 Pac. 483.

And if the cases cited do not in fact settle the question, we nevertheless believe that the act of Congress, providing for the filing of leases in the Agency at Muskogee, and making such filing constructive notice, was not repealed but is still in full force and effect, because the whole matter is one of federal control, concerning which Congress alone had the power to legislate, and over which it had exercised its unquestioned authority; because the state had, by the express and explicit provision of its own constitution, adopted and accepted the provisions of the Enabling Act that so far as Indians and their property were concerned, the authority of the national government should be unimpaired by the erection of the state, and because the whole current of judicial utterances by the state, since statehood, clearly demonstrates that these provisions meant precisely what they said.

As we will set forth in the next succeeding subdivision of this brief, we are equally firm in our conviction that even if the Act of March 1, 1907, providing that the filing of leases at the Union Agency should be notice, was repealed and ceased to be of any further force and vitality from and after November 16, 1907, when the State of Oklahoma was admitted into the Union, that, nevertheless, the consequences assumed by appellant do not flow from it, but, on the contrary, a result directly the opposite must, upon well recognized principles, necessarily follow. We say this because if the admission of Oklahoma repealed the filing law of 1907, it necessarily repealed also the then existing federal act for the registration of land titles and left the matter at large, wholly unaffected by the provisions of any state statute with reference to the recordation of land titles; for, in this situation, being left without any provision by Congress upon the subject of record or notice, the rights of the parties would depend upon wholly different principles from those upon which modern recording acts are bottomed.

This must be so because it is a well settled proposition that such matters as patents, issued either by the General Land Office of the United States, or by the land office of the state, or the proceedings had in such department of the general government or the state government, are not required by state recording acts to be spread upon local records, in order to be effectual, and to impart notice to persons dealing

with the subject-matter, and afford protection to those who are the direct grantees of the government, or stand in the attitude of such, and because the Secretary of the Interior, under the federal acts as they existed at the times when the matters in this case transpired, constituted a special tribunal or agency, designated by the general government, for the ultimate granting of oil and gas mining privileges on the lands in question.

The reasoning of the Supreme Court of Oklahoma as to the continuance in force and effect of the congressional act is convincing. In *Scioto Oil Co.* v. *O'Hern, supra,* that court said:

> "In the present case the Act of March 1st, 1907, requires the filing of such lease with the Union Agency, and specifically declares that such filing shall be notice, and all parties are charged with knowledge, of the existence of such leases when so filed, and have the right, under the law, to obtain all the information which was before given as a mere matter of courtesy. To say that Congress may still regulate and control the leasing of restricted lands and at the same time permit legislation of the state to interfere with such control and form the basis of rights acquired antagonistic to those acquired in pursuance to the congressional regulations, would be to deny full jurisdiction to Congress in the premises and would hamper and seriously retard the administrative department of the government in the performance of its functions with reference thereto."

And the inference as to the intent of Congress deducible from that portion of the Act of May 27, 1908, quoted at page 23 of the appellant's brief, is directly the contrary of that suggested by appellant's counsel. Counsel has given only the proviso to second paragraph of section 3 of the act.. The whole of the second paragraph reads as follows:

> "That no oil, gas, or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this act but the same shall be subject to the approval of the Secretary of the Interior as if this act had not been passed: *Provided*, That the owner or owners of any allotted land from which restrictions are removed by this act, or have been removed by previous acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under or by authority of any act of Congress, shall have power to cancel and annul any oil and gas mining lease on said lands, whenever the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing cancelling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situated."

Congress was aware that these departmental leases would *not* appear on the local records. It was,

however, aware that from time to time federal control and supervision over lands upon which such leases existed would be relinquished. It accordingly provided in express terms that in such circumstances the owner might, by private contract with the lessee, abrogate such leases. To the end that such proceedings should appear in the local records where they properly belonged, it provided both that these cancellations should not only be executed in the form prescribed by the state law, but that they be actually recorded in the county where the land lay. As we have pointed out, it was not required that the original leases be executed in the form required by state law, or that they be recorded in the state registry. The act so far from being an abrogation or repeal of the federal provision in regard to notice of leases by filing in the Union Agency was supplementary to and the complement of that law. That Congress possesses now and has at all times possessed a paramount power over the subject, both by reason of its guardianship over the Indians and the express provisions of the federal and state constitutions is indisputable.

—*Lone Wolf* v. *Hitchcock*, 197 U. S. 553;
Choctaw Nation v. *United States*, 119 U. S. 1;
Stephens v. *Cherokee Nation*, 174 U. S. 445;
United States v. *Allen*, 179 Fed. 13;
Tiger v. *Western Inv. Co.*, 221 U. S. 286;
Indian Territory Ill. Oil Co. v. *State of Oklahoma*, 240 U. S. 522;

Act approved June 16, 1906, Sec. 3, Par. 3; Ordinance accepting Enabling Act, Bunn's Constitution, section 497, Volume 1, Revised Laws Oklahoma, p. ccxi.

When the State of Oklahoma came into the Union, a very considerable portion of the lands in that part of the state which had formerly constituted the Indian Territory was still in the hands of dependent Indian people, over whom the government had, from its very foundation, exercised a guardianship, and which guardianship it was unwilling to relinquish. It, therefore, reserved to itself, as absolutely and as completely as though no state were to be created here, the right to determine for itself what was best for its wards, and the exclusive power of legislating on the subject. This was not in derogation of any power properly appertaining to the state. It was simply retaining in the hands of the national government a matter which had always properly belonged to the national government, and which until relinquished, did not fall within the plane of state control.

The very subject-matter with which we are dealing in this case was as completely excluded from the operation of state laws as the customs duties, or interstate commerce, or any other appropriate branch of federal legislation. There is no higher attribute of sovereignty than the taxing power, and yet, even as to that, the state has no control whatsoever over those things which fall exclusively within the sphere of federal control and that derive their existence and

authority from the national government and not from the state.

—*McCulloch* v. *Maryland*, 4 Wheat. 316, 429;
Choctaw & Gulf R. R. v. *Harrison*, 235 U. S. 292;
Indian Territory Ill. Oil Co. v. *State of Oklahoma*, 240 U. S. 522.

Section 1 of the Enabling Act provides:

> "That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished) or limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed." 34 Stat. 267 (Bunn's Const. and Enabling Act, section 503).

Section 3, article 1, of the State Constitution provides:

> "The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe or nation; and that un-

til the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States." (Bunn's Const. and Enabling Act, section 4.)

It so appears that prior to and at the time of the admission of the State of Oklahoma, and ever since, the matter of providing when and how the restricted lands of allottees of the Five Civilized Tribes should be leased and worked for oil and gas mining purposes was within the exclusive domain of congressional action. We must look, not to the state laws, concerning the making of leases or the conveyancing of property, or the recording of land titles, for the solution of question pertaining to the rights of those claiming leasehold interests, but solely to the laws of the United States. Before there was ever any attempt to regulate conveyances or the recording of titles in Indian Territory, or any provision for the allotment of lands, there were laws authorizing the taking of mineral leases, under the supervision and with the approval of the Secretary of the Interior, in certain instances. It was not until the Act of Congress approved February 19, 1903 (32 Stat. 841), entitled "An act providing for record of deeds and other conveyances and instruments of writing in Indian Territory, and for other purposes," that there was any law for the local record of land titles in Indian Territory. The act cited adopted chapter 27 of Mansfield's Digest of the Statutes of Arkansas, and

divided the territory into recording districts and made certain changes to fit the situation to the actual condition of affairs to be met here. Before the passage of this act, the various allotment agreements had been negotiated with the Five Civilized Tribes, all of which carry provisions for the making of mineral leases, but all of them upon the condition that the same were to be subject to the approval of the Secretary of the Interior and in accordance with rules and regulations to be adopted and prescribed by him. By the subsequent act, approved April 26, 1906 (34 Stat. 137), it was required by section 20:

> "That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing, and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided*, That allotments of minors and incompetents may be rented or leased under order of the proper court; *Provided, further*, that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

Thus stood the law (the Congress being the sole legislative power on all subjects) at the time the matters and things transpired which gave rise to the case of *Shulthis* v. *McDougal*, 170 Fed. 529. Appellant is

in error in saying that case was decided prior to the Act of March 1, 1907, making leases filed at Union Agency, Muskogee, constructive notice. The case was decided after the act was passed, though the rights of the parties had been irrevocably fixed prior to its passage. In this situation, the Circuit Court of Appeals for the Eighth Circuit was constrained to hold that Congress had, by its own pronouncement, made the local recording law then in force in this jurisdiction applicable. That was a controversy between a lessee whose lease was dated prior to the deed under which the other party claimed, but of which the latter was held to have had no actual notice, and it was properly held that there was no constructive notice because the lease had not been recorded in compliance with existing provisions of law.

Other instances of like nature had arisen and were brought to the attention of Congress, and it being manifest that it could frequently happen that during the period while a lease was in process of going through the Department, a transfer of the lands involved might be effectuated, and the lessee defeated of his rights, and find that he had drawn a blank in the lottery of Indian Territory affairs, even after he had secured the approval of the Secretary of the Interior to his lease (because of statutes which Congress had itself enacted), there was incorporated in the Indian Appropriation Bill, approved March 1, 1907, the provision hereinbefore quoted, that "the filing heretofore or hereafter of any lease in the of-

fice of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice." Congress thus ordained that where one had negotiated an oil and gas mining lease with an allottee and had duly lodged the same in the Agency for the purpose of securing that approval of the Secretary which was necessary to give it final force and validity, he should be protected against the claims of all persons who acquired their rights subsequently.

The law is thus made by positive and unequivocal declaration to meet both the substantial equities of the situation and the necessary practical conditions under which the process of making these leases was carried on.

When the state was admitted to the Union, there was no longer any field of operation for the general federal laws which Congress had enacted with regard to the recording of land titles. That was a matter chiefly of state concern and within its proper domain. The state had an undoubted right to prescribe the necessary conditions to the assertion of effectual title to lands lying within its borders insofar as it did not thereby impair or hamper or interfere with a legitimate federal agency. The theretofore existing local recording act was, therefore, by necessary intendment, repealed. Precisely the opposite was true, however, of the leasing for oil and gas mining purposes of lands by allottees whose title was still subject to any governmental restriction. The federal

government was, through its own agencies and instrumentalities, to continue to authorize and approve oil and gas mining leases, and other dealings with restricted lands.

There was, consequently, still a distinct field of operation for the Act of March 1, 1907, with regard to the filing of leases at the Agency, and no rule, either of practical advantage or of technical construction, warrants the assumption that it was intended to be repealed. It was certainly much clearer, more explicit and freer from any possibility of controversy to have such statutory rule of notice in force than to have parties who were engaged in the acquisition of leases and the purchase of titles dependent upon general deductions and analogies for the fixing of their respective rights. It seems to us, therefore, manifest that there was no thought in the minds of the lawmakers that by the passage of the Enabling Act and the erection of a state here, the Act of 1907 would become *functus officio*. It harmonizes much better with the policy theretofore pursued by Congress, and with the security of titles, the orderly dispatch of business, and the general commercial welfare of the community, to hold that this law was in no sense repealed or impaired in its operation by any provision in the Enabling Act. We are confident that no such repeal or impairment was ever intended, and that this law is still a subsisting statute for the governance of all parties and cases falling within its purview. In this position, we think we are abundantly

reinforced by the whole current of state adjudications for the past ten years.

The state court has by repeated decisions recognized the inapplicability of state statutes to the matter of these allotted and restricted lands as to which Congress still retained its paramount control.

—*Wilson* v. *Morton*, 29 Okla. 745, 119 Pac. 213.
Chapman v. *Siler*, 30 Okla. 714, 120 Pac. 608.
Walker v. *Brown*, 43 Okla. 144;
Allen's Will, 144 Pac. 1055;
Carson v. *French*, 45 Okla. 819, 147 Pac. 319;
Ashton v. *Noble*, 46 Okla. 297, 148 Pac. 1043

We are unable to differentiate the principles underlying the foregoing adjudged cases and the question involved in the one at bar. If the existing acts of Congress with regard to matters retained in congressional control passed upon in those cases remained unrepealed after statehood, so that the statute of wills, the statute with regard to champerty and maintenance, the provisions of the state law with regard to the lien of judgments and the means of enforcing the same, were inoperative because of existing federal legislation enacted prior to statehood and unrepealed by either the Enabling Act or the state constitution, or both together, we are unable to perceive how or why the admission of the state swept away the federal statute providing that the filing of the lease in the Agency at Muskogee should be notice to the world, and required oil lessees of Indian lands, at their peril, to bring themselves within the letter of the state law, providing for the record of land titles.

We confidently insist that the federal statute of March 1, 1907, is still in force, and that by virtue thereof the holders of the departmental oil and gas mining lease are entitled to precedence over the lessee of the deceased allottee's heirs. The courts below were correct in so holding and should be affirmed.

III.

If the Act of March 1, 1907, should be held to have been repealed by the Enabling Act, and the admission of the State of Oklahoma into the Union, nevertheless the oil and gas mining lessees of Jennie Samuels under the departmental lease approved by the Secretary of the Interior, are prior in time and prior in right to those claiming under the subsequent leases made by the allottee's heirs after the approval of the former lease.

The foregoing proposition must be true, because if the admission of Oklahoma to statehood had the effect of working a repeal of the Federal Act of March 1, 1907, it also undoubtedly had the effect of repealing all other federal statutes with regard to the recording of leases and other land titles. There can be no question about the proposition that the recording laws of the state have no effect upon, and are not applicable to, those matters and things which are within the legislative control of Congress. If Congress has not provided any system of registration, nor enacted any law, by which the priorities of the parties are to be determined from the filing or re-

cording of an instrument in a given office, or if such statute has, it is ascertained, been repealed, then the matter is left wholly at large and must be determined upon general principles. We have already pointed out that it was the manifest purpose of Congress in passing the Act of March 1, 1907, not to leave the matter so at large, but fix a certain and definite test by which, in every instance, absolute notice should be brought home to all who dealt with the lands of these allottees.

We have urged, and with confidence, that this very fact negatives the idea that the congressional provision upon the subject, enacted in 1907, was ever intended to be repealed, or has, in fact, been repealed. But, assuming now that a repeal was intended and effected, we do not see how it can help the situation of appellant.

The matter of the making of leases upon lands situated as were the lands involved in this suit, when the original allottee signed and executed the oil and gas mining lease in question, was wholly within the control of the federal government. That government had provided how and in what manner such a lease could be made so as to have any effect and validity. It had expressly declared it might not be made otherwise. Such was then and is today the law of the land. It was the supreme law of the land. We do not see how it can be contended that any person had a right either in law or in equity, to deal with a piece of property, where there was in existence, either as a con-

summate fact, or potentially, because pending, a lease of this character upon the lands involved. The Secretary of the Interior was the agency designated by the general government through whom, and through whom alone, a lease of this kind could be made. The Secretary, as the head of the Department of the Interior, constituted a federal agency working out a policy of the federal government. It is the same department of the government and the same instrumentality in all essential particulars, as that by which the government disposes of its own public lands. This analogy has been frequently pointed out and referred to in adjudged cases:

—*Wallace* v. *Adams*, 143 Fed. 721;
Lowe v. *Fisher*, 223 U. S. 107;
Lynch v. *Harris*, 33 Okla. 23, 124 Pac. 50;
Bonifer v. *Smith*, 166 U. S. 849.

It appears to have been uniformly held that state recording laws are not applicable either to government patents or state patents, and that the records of the General Land Office are public records, copies of which are not required to be lodged in the local registry of land titles in order to afford protection to those who derive their rights through such proceedings.

—*Rhineheart* v. *Schuyler*, 7 Ill. 473;
Lomax v. *Pickering*, (Ill.) 46 N. E. 238;
Sayward v. *Thompson*, (Wash.) 40 Pac. 379;
Lemle v. *Louisiana Farm Land Co.*, (La.) 66 So. 185.

In the case of *Lomax* v. *Pickering*, the Supreme Court of Illinois summarized the law as follows:

> "Here the McClure deed, under which appellant claims, with the approval of the president indorsed thereon, was recorded in the recorder's office of Cook County, March 11, 1871, while the Horton deed, containing the approval of the president, was not recorded until March 12, 1873; and it is contended that the deed first recorded, bearing the approval of the president, will take priority over the other deed, recorded at the later date. As respects the approval of the president, required by the treaty, and the provision in the patent to render the deed effectual, we do not think the recording laws have any bearing upon it. There was a record of the approval of the president in the department at Washington, and that record was notice to all concerned from the time it was made, and we do not think the recording laws of the state required a copy of that record to be recorded in the recorder's office where the land is located. A record of that character is similar to a patent issued by the president for lands that belong to the government, which is not required to be recorded in the county where the land is located."

This case was affirmed by the Supreme Court of the United States (*Lomax* v. *Pickering*, 173 U. S. 26) and the above declaration of law quoted and approved.

Furthermore, it has been adjudged that the limitations and restrictions peculiar to Indian land titles and imposed by act of Congress need not be incorporated in a patent issued for the land. It is suf-

ficient that they are a part of the law, as declared by the Supreme law-making authority on the subject.

In *Felix* v. *Yaksum*, (Wash.) 137 Pac. 1037, it is said:

> "Nor is it of any determinative force that the patent contains no restriction against alienation. The law becomes a part of the patent, and no federal official can waive or render inoperative, because of the failure to incorporate it, any limitation which Congress has imposed upon the title."

Here in Oklahoma, the statutes of the United States authorize the making of oil and gas mining leases by allottees who hold a restricted title, through the agency of the Secretary of the Interior, *and not otherwise*. There is no provision of law requiring such a lease to be acknowledged. There is no precise form in which it is to be evidenced. That is all left to the determination of the special agency or tribunal—the Secretary of the Interior—designated by Congress for that purpose. There is no necessity, by any law now in existence (unless it be the Federal Acts hereinbefore referred to) which requires such a lease ever at any time to appear upon the local land records. And we think that there can be no question about the proposition we have already stated, that if the erection of Oklahoma into a state had the effect of repealing the Act of 1907, with regard to the notice to be imparted by the filing of a lease in the Agency at Muskogee, it also, necessarily, repealed the prior law with reference to recordation of such

instruments in the local land title register. As a matter of law it was not necessary that either the patent to the allottee or any mineral lease made by the allottee in this case upon his lands be recorded at any other place than the offices pointed out in the federal acts themselves. And, to say that the state can, by the enactment of a law providing for the record of land titles, destroy and render nugatory the force and effect of that which is done under the sanction of a national law dealing with a subject within its absolute legislative control, is directly counter to that control for which the general government stipulated when it provided for our coming into the Union, and to which the whole people, in most solemn manner, assented.

As between all parties who derive their interests through conveyances in no wise dependent upon federal supervision, doubtless the state law is determinative of their rights; but the state law ought to have no effect whatever, and can have no effect whatever, upon the determination of the relative rights of persons who derive their title through federal instrumentalities and those who claim from some other source.

It seems clear, therefore, that if the Act of March 1, 1907, which provided that the filing of leases at the Union Agency should be notice, was stricken down upon the admission of the state into the Union, then we have no statutory law upon the subject. We have seen that the state registration laws have no

applicability or effect. Congress, the only legislative body having authority to act in the premises, has remained silent except to declare by the Act of May 27, 1908, "That leases of restricted lands for oil, gas or other mining purposes, lease of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, *under rules and regulations provided by the Secretary of the Interior, and not otherwise.*" In this situation of affairs an allottee of restricted lands signs and executes an oil and gas mining lease. This lease is governed by rules and regulations of the Secretary of the Interior, and according to those rules and regulations, must be filed at the Union Agency at Muskogee, and thence transmitted to Washington for the Secretary's approval. The Secretary, in this case, whatever the specific character of the functions he is performing, is the designated agency or instrumentality, appointed by the government, for consummating this sort of contract. It is beyond comprehension that it was ever for an instant supposed that either the original allottee, or any successor in title, would be able to dispose of such lands so as to cut off the rights of the lessee under a departmental lease duly approved. We cannot see any escape from the proposition that when the Secretary approved the lease involved in this case, it took effect precisely as though it had been presented to him for his approval and approved upon the very

day that it was executed. There being no law requiring its registration at any other place in order to give it validity, or requiring any record of the transaction to be made elsewhere than in the Department of the Interior, we feel that the court must hold and declare the law to be, that it was effectual against the whole world, and that the lessee, or grantee, under that document, has an unimpeachable title, notwithstanding the transactions between the heirs of the allottee and third persons, who are now claiming ownership of the property. We confidently believe that upon the examination of this case in its true light, the conclusion is inescapable that either the Federal Act of 1907 made the filing of leases at the Agency notice, or that, if said act be no longer in force, there is no statutory provision upon the subject and that the lease of appellees is entitled to precedence over the title of appellant as held by the court below.

IV.

The leases under which appellant is asserting its claim and which constitute its only alleged right in the premises, have never been approved by the Secretary of the Interior, as required by section 2 of the Act of Congress approved May 27, 1908 (35 Stat. 312), and are for that reason not valid instruments and confer no right on appellant.

Stated somewhat differently and a little more fully the proposition is: That where lands have been

allotted to full-blood Indians of the Five Civilized Tribes, and the allottee subsequently dies and the lands descend to heirs who are also full-blood Indians, no valid oil and gas lease of such lands may be made by these full-blood heirs, except with the approval of the Secretary of the Interior. Such inherited lands are still in the category of restricted lands by reason of the proviso to section 9 of the Act of May 27, 1908:

> *"That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."*

For the convenience of the court we will set forth in so many words, instead of merely making reference thereto, the pertinent parts of the Act (35 Stat. 312) and which appear in sections 1, 2, 5 and 9 thereof:

> "SECTION 1. *Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: * * * and all allotted lands of enrolled full-bloods and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance, prior to April twenty-sixth, nineteen

hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe * * * "

"*Sec. 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court, if a minor or incompetent for a period not to exceed five years, without the privilege of renewal: *Provided,* That *leases of restricted lands for oil, gas, or other mining purposes,* leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, *and not otherwise:* And *provided further,* That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years, and all females under the age of eighteen years." (Italics supplied.)

"*Sec. 5.* That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument, or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted

land made in violation of law before or after the approval of this act shall be absolutely null and void."

"*Sec. 9.* That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further,* That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further,* That the provisions of section twenty-three of the Act of April twenty-sixth nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

While it is true that the question involved has not been passed upon by this court in the precise form now presented, the principle involved has already been authoritatively decided.

—*Parker* v. *Richard*, 250 U. S. 235;
Parker v. *Riley*, 250 U. S. 66, 69.

In *Parker* v. *Richard*, *supra*, this court said:

> "By the Act of 1908, which imposed the restrictions on alienation and contained the leasing provision, Congress further declared in 9, 'that the death of any allottee * * * shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.' In the absence of the proviso it would be very plain that on the death of the allottee all restrictions on the alienation of the land allotted to him were removed. But the proviso is there and cannot be disregarded. It obviously limits and restrains what precedes it. In exact words, it puts full-blood Indian heirs in a distinct and excepted class and forbids any conveyance of any interest of such an heir in such land unless it be approved by the court named. In other words, as to that class of heirs the restrictions are not removed but merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval."

The lands being restricted it inexorably follows that any attempted oil lease thereof without the Sec-

retary's approval is no lease at all because section two of the act plainly says "leases of restricted lands for oil, gas or other mining purposes * * * may be made, with the approval of the Secretary of the Interior * * * and not otherwise."

And this result is not the fruit of technicality but bottomed on sound reason.

The matter of leasing is easily differentiated from selling and conveying. The leasing involves much more than the mere contract at the time of making. In the event of the discovery and production of oil, it involves operation through a long and indefinite period. The two ideas have always been kept distinct, and dealt with separately, by the Congress in the enactment of its statutes. Throughout a period of many years, there has been the clearest sort of evidence that Congress desired to retain the approval of oil and gas leases, made by its Indian wards who were not fully competent to handle their own affairs, in the hands of the Secretary of the Interior. When it came to finally dealing with the specific subject of leasing, the language of section 2 of the Act of May 27, 1908, carries well nigh irresistible conviction that there was no thought, that as to part of these Indian wards in the Five Civilized Tribes not considered competent, the Secretary must approve their oil leases, while as to another class of incompetents, no such requirement was imposed.

If it be urged that so far as absolute sale of the land was concerned this very thing was in fact done

by vesting power of approval in the County Courts, the very obvious answer is that the two are not the same. While sale of the land would sometimes involve large value, ordinarily and generally this would not be true. Besides it would present but a single and complete transaction. On the other hand, the oil lease very frequently and generally involves huge values. It is a complex matter. It is only begun when the contract is made. The wealth it produces usually comes later. It is problematic how great a fortune will be involved. The Indian may become a millionaire over night, and continued supervision be more absolutely essential than ever before. The County Court could only approve—its function ended there. It had neither authority nor machinery for going further. The Secretary had both. Were not all these matters present in the minds of the legislators? And when they broadly provided that oil and gas leases of restricted lands might be made with the approval of the Secretary, *and not otherwise,* we think it much more in harmony with the entire legislative scheme, that they must have meant, and did mean, to retain this jurisdiction in the Secretary, wherever there remained any sort of restriction or limitation on the allottee or his land.

There is no pretense in this case that any approval by the Secretary of the leases under which appellant is claiming was sought or had. Without it, they were mere scraps of paper. Appellant has not shown either equitable claim or legal right, and the

decisions of the two courts below should be affirmed on this ground, independently of the other propositions.

We urge, therefore, that upon this record it appears the lease of appellees was properly approved; that it is prior in time and prior in right to any claim of appellant; that the leases of appellant are without validity; and the opinion of the Circuit Court of Appeals and decree of the District Court should be affirmed.

Respectfully submitted,

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